FOR ARGUMENT

Supreme Court, U. S.
FILED
FEB 16 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-404.

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., (Now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey

Appellees.

On Appeal From the Supreme Court of the State of New Jersey.

BRIEF OF THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON, STATE OF NEW JERSEY.

Of Counsel:
MICHAEL J. HOGAN,
Assistant County Solicitor.

M. JEFFERSON DAVIS,
Burlington County Solicitor,
Burlington County Office Building,
Mount Holly, New Jersey. 08060
Attorney for Amicus Curiae, Board of Chosen Freeholders of the County of Burlington of the State of New Jersey.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

TABLE OF CONTENTS.

	Page
INTEREST OF AMICUS CURIAE	1
QUESTIONS PRESENTED	4
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. The Resource Conservation and Recovery Act of 1976 P. L. 94-580, 42 U. S. C. A. § 6901 *et seq.* Is Not Federal Legislation Intended to Pre-empt the State From the Regulation of Waste Disposal	6
II. The State of New Jersey, as Any State, Has the Responsibility and Authority Through Its Police Power to Provide a Legislative Plan for Preserving and Regulating Solid Waste Disposal Facilities	9
III. Solid Waste in Its Form for Disposal Is Not an Item of Interstate Commerce and Is Subject to State Regulation and Prohibition When It Is for the Protection of a State's Citizens by Preserving the Areas Available for Sanitary Landfill as a Natural Resource	11
CONCLUSION	15

TABLE OF CITATIONS.

Cases:	Page
Askew v. American Waterways Operators, Inc., 411 U. S. 325 (1973)	7
Berman v. Parker, 348 U. S. 26 (1954)	9
Bibb v. Navajo Freight Lines, 359 U. S. 520 (1957)	12
Brotherhood of Loc. F. & E. v. Chicago, R. I. & PRR Co., 353 U. S. 129 (1968)	12
California v. Zook, 336 U. S. 714, reh. den. 337 U. S. 921 (1949)	7
City of Philadelphia, et als. v. State of New Jersey, et als., 430 U. S. 141 (1977)	6
City of Philadelphia, et als. v. State of New Jersey, 73 N. J. 562, 376 A. 2d 888 (1977)	6
Clasen v. State of Indiana, 306 U. S. 439 (1939)	13
Florida Lime and Avacado Growers, Inc. v. Paul, 373 U. S. 132 (1963)	7
Great A&P Tea Co. v. Cotrell, 424 U. S. 366 (1976)	9
Hood & Sons, Inc. v. DuMond, 336 U. S. 525 (1949)	12
Huron Portland Cement Co. v. Detroit, 363 U. S. 440 (1960)	9, 13
Pennsylvania v. West Virginia, 262 U. S. 553 (1923)	12
Pike v. Bruce Church, Inc., 397 U. S. 137 (1970)	13
Sligh v. Kirkwood, 237 U. S. 52 (1915)	11

Statutes:	
N. J. S. A. 13:1I-1 et seq. (New Jersey Waste Control Act)	2, 3, 10, 12
N. J. S. A. 13:1I-9	10
42 U. S. C. A. § 6901 et seq. (Resource Conservation and Recovery Act of 1976, Public Law 94-580)	4, 6, 7
42 U. S. C. A. § 6901(a)(4)	8
42 U. S. C. A. § 6929 (Retention of State Authority)	8
42 U. S. C. A. § 6941 (State or Regional Solid Waste Plans)	8
42 U. S. C. A. § 6942(b)	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-404

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC. and DELORENZO—INTERSTATE WASTE REMOVAL CO., (Now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey

Appellees

BRIEF OF THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON, STATE OF NEW JERSEY

INTEREST OF AMICUS CURIAE.

The Amicus submits this brief pursuant to Rule 42, as the County of Burlington is a body corporate and politic within the State of New Jersey; a political sub-division

therein, one of twenty-one counties. This brief is respectfully submitted in support of the position of the State of New Jersey, in an attempt to preserve those basic rights of States to protect their citizens from unnecessary danger and preserve basic land resources from irreparable environmental harm and depletion.

Burlington County is the largest county in dimension in New Jersey. In addition, the population of Burlington County is approximately 360,000 people. This County is rapidly growing, both in industry and residential population. The borders of the County extend from the Delaware River to the Atlantic Ocean. A large portion of Burlington County's population is concentrated along the Delaware River, opposite the City of Philadelphia, one of the appellants in this appeal. Burlington County is a diverse County, not only in its population but also in its economic development. The armed forces, through McGuire Air Force Base and Fort Dix, residential housing construction, industry and commercial enterprises, as well as recreation, contribute to and are essential elements of the economic makeup of Burlington County. As part of this economic diversity there are a number of sanitary landfills in Burlington County which the New Jersey Waste Control Act, N. J. S. A. 13:1I-1 *et seq.*, regulates for the well-being and protection of New Jersey's citizens.

The development of Burlington County is intricately related to the protection of its resources, which in turn are all related to one another, including the ecology of the Pine Barrens, the County's water resources, its tidelands, its air quality, and the very limited land available to its ever increasing citizenry for waste disposal, both solid and liquid. While these characteristics are not unique to Burlington County, nevertheless it has only a specific amount of acreage available for this purpose. The New

Jersey Legislature has recognized this fact by its enactment of the New Jersey Waste Control Act.

The disposal of Pennsylvania waste in Burlington County has accelerated the depletion of acreage available for sanitary landfill. This deprives New Jersey, and particularly Burlington County, of the ability to manage this very localized resource to the fullest extent and for the longest term possible.

Burlington County still has vast areas of rural land. If the New Jersey Waste Control Act were held unconstitutional, these rural areas would become the target for vast increases of Pennsylvania and other out-of-state waste. That would create hazards for the people and damage to the sensitive ecology of these rural areas of Burlington County.

There is much to be said for the resolution of problems on a regional basis. However, Burlington County's status as a sub-region would result in its bearing the full brunt of out-of-state dumping, if the New Jersey Waste Control Act is not upheld.

This Court's decision will have national implications. However, it will also have direct impact on the quality of life of the people in these local areas which are, or will become, the repositories for waste.

QUESTIONS PRESENTED.

1. Does the Resource Conservation and Recovery Act of 1976, P. L. 94-580, 42 U. S. C. § 6901 *et seq.*, render invalid the New Jersey prohibition against the disposal of waste originating out-of-state?

2. May a state in the exercise of its police powers preserve and regulate solid waste disposal facilities in the same fashion as it does for police protection, road construction and environmental protection?

3. Is sanitary landfill space a resource, natural or otherwise, which can be protected by State regulation?

SUMMARY OF ARGUMENT.

The Amicus submits that the New Jersey Act regulates a natural resource. That resource can only be described as a very limited number of acres which are available and environmentally suitable to be considered and used for the disposal of solid waste.

Because of the ever increasing need for solid waste disposal facilities in developing counties, local municipalities are having to travel greater distances to dispose of solid waste. The dumping in New Jersey of solid waste originating outside the State of New Jersey, and deposited in New Jersey, will be accelerated. The premature depletion of this valuable resource to the extent that eventually this resource will be exhausted before its time, will force use of land that is not best suited for environmentally sound landfill. Disposable garbage and solid waste are not items of interstate commerce, and may permissibly be regulated by the several States. In addition, this waste is of such a hazardous nature, particularly in its decaying state, that the State of New Jersey to protect its citizens may prohibit its disposal in New Jersey, thereby guaranteeing that New Jersey's citizens will continue to have environmentally sound, as well as safe landfill areas for its own solid waste for many years to come, or at least until other alternatives can be found.

ARGUMENT.

I. The Resource Conservation and Recovery Act of 1976, Pub. L. 94-580, 42 U. S. C. § 6901 *Et Seq.* Is Not Federal Legislation Intended to Pre-Empt the State From the Regulation of Waste Disposal.

Previously, this Court heard argument in this matter and remanded it for reconsideration by the Supreme Court of New Jersey. *City of Philadelphia, et als. v. State of New Jersey, et als.*, 430 U.S. 141 (1977).

The basis of the remand was that only days before oral argument the President had signed into law the Resources Conservation and Recovery Act of 1976, P. L. 94-580, 42 U. S. C. A. § 6901 *et seq.* The question arose whether this new Act affected the New Jersey legislation in question through the doctrine of pre-emption.

On remand, the Supreme Court of New Jersey held that the intent of Congress to leave the regulation of waste disposal to the several states insofar as the disposal of non-hazardous waste is concerned is manifest. *City of Philadelphia, et als. v. State of New Jersey*, 73 N. J. 562, 569, 376 A. 2d 888 (1977). The Court stated:

> As to the disposal of solid waste of a non-hazardous nature, it also seems clear that there has been no federal pre-emption by virtue of this statute. On the contrary, as will be seen, the Act affirmatively encourages state action and expressly eschews any intent on the part of Congress to do more than offer guidance together with technological and fiscal support.

The Amicus takes the same position as the Supreme Court of New Jersey and urges this Court to adopt the same.

For pre-emption to occur, it must be clear that the Federal provisions are inconsistent with those of the state. The well-recognized rule concerning pre-emption is that Congress must clearly manifest its intent to preclude state action. *California v. Zook*, 336 U. S. 714, reh. den. 337, U. S. 921 (1949). *Florida Lime and Avocado Growers v. Paul*, 373 U. S. 132 (1963).

It is clear that the Federal legislation here in question does not manifest any intent to pre-empt the field or to indicate that state legislation is to be viewed as an obstacle to the effectiveness of the goals propounded by Congress.

42 U. S. C. A. § 6901 *et seq.* has as its goal the setting of minimum standards within which a state may operate. The statute requires Federal guidelines to be developed for the definition of common solid waste management problems. The Federal Administrator is to provide additional guides "to assist in the development and implementation of state solid waste management plans". 42 U. S. C A. § 6942(b).

As a generally accepted rule, the Court, where environmental interests are concerned, has been reluctant to find the pre-emption doctrine applicable. *Askew v. American Waterways Operators, Inc.*, 411 U. S. 325 (1973).

Given this Court's reluctance to find the pre-emption of State legislation where it is not clearly mandated, and particularly where there are strong environmental concerns, the appellants must define clearly where Congress has manifested a pre-emptive intent. The most conservative reading of the Federal legislation and its legislative history leads to the conclusion that pre-emption was not intended, particularly in light of the specific finding of Congress that ". . . collection and disposal of sold wastes should continue to be primarily the function of state, re-

gional and local agencies . . .", 42 U. S. C. A. § 6901 (a)(4). Congress could not have spoken more clearly.

In the area of hazardous wastes, the principal thrust of the Federal legislation is to enable the setting of minimal standards for disposal. It clearly indicates that states are free to set more stringent standards under 42 U. S. C. A. § 6929 entitled "Retention of State Authority." New Jersey's law provides for these more stringent regulations. The Federal legislation acts as the administrative guide and New Jersey's legislation is the vehicle which, while conforming to minimum Federal guidelines, carries the primary burden for the protection of its resources and its citizens. The Federal law will assist technologically and eventually financially if the state chooses to elect such assistance. 42 U. S. C. A. § 6941, Sub-Chapter IV entitled "State or Regional Solid Waste Plans" clearly sets forth its objectives as they relate to State Plans:

> The objectives of this subchapter are to assist in developing and encouraging methods for the disposal of solid waste which are environmentally sound and which maximize the utilization of valuable resources and to encourage resource conservation. Such objectives are to be accomplished through Federal technical and financial assistance to States or regional authorities for comprehensive planning pursuant to Federal guidelines designed to foster cooperation among Federal, State, and local governments and private industry.

This section clearly demonstrates that rather than preempting the solid waste disposal field, Congress is striving to foster cooperation which is accomplished by Federal technological and financial assistance to both States or regional authorities. New Jersey law clearly falls within that statutory statement of objectives.

II. The State of New Jersey, as Any State, Has the Responsibility and Authority Through the Police Power to Provide its Citizens With a Legislative Plan for Preserving and Regulating Solid Waste Disposal Facilities.

The Amicus as one county within New Jersey, argues that the preservation of local land resources is within the power of the State legislature. The State legislature is the most viable body to set environmental protective standards where they pertain to solid waste disposal for its citizens.

All states retain the powers to protect their citizens in matters of local concern. *Huron Portland Cement Co. v. Detroit,* 362 U. S. 440 (1960); cf. *Berman v. Parker,* 348 U. S. 26 (1954) are cases which support the proposition that states retain broad authority to protect their citizens. This includes the authority to protect the environment. One of the leading cases, *Great A&P Tea Co. v. Cotrell,* 424 U. S. 366 (1976), states that the Court must decide between conflicting needs of local concern and the freedom of national commerce. The New Jersey law which seeks to prohibit the disposal of out-of-state waste can only be construed as an attempt to protect the health of New Jersey residents as well as the environment, both being intricately related. The appellants do not transport products or materials considered as products of interstate commerce. The primary reason for transporting waste to New Jersey from Pennsylvania is to dispose of it—not to sell it in the commerce sense. Philadelphia is disposing of its waste in Burlington County because it is easier and quicker to do so, and New Jersey landfills are more accessible both physically and legally than in Pennsylvania. The waste disposal business conflicts with the responsibility of the state to provide for its inhabitants a

place to dispose of their own solid waste in a safe manner. New Jersey is experiencing a crisis in its search to find landfills which do not harm the environment and are within range of local municipalities. The intent of the New Jersey statute is not economic protection of landfill operators, as many New Jersey landfill operators accept out-of-state waste, but rather environmental protection and the protection of the health of the state's citizenry. P. L. 1973, c. 363, of the laws of the State of New Jersey says:

> The legislature finds and determines that since enactment of P. L. 1974 c. 39 (C13:1I—*et seq.*) the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to prove an even greater threat to the quality of the environment of New Jersey, that the available and appropriate landfill sites within the state are being diminished by the treatment and disposal of waste which originated or was collected outside the state and that the public, health, safety, and welfare require that the treatment and disposal within the state of all wastes generated outside of the state be prohibited. N. J. S. A. 13:1I-9.

The New Jersey law was not enacted without great consideration, and only after clear findings that the New Jersey environment and the welfare of its citizens has been unnecessarily burdened. Local environmental concerns and not interstate commerce should be the overriding consideration in preventing the transportation into a state of material which will cause the health, safety and welfare of its citizens to suffer unduly. In dealing with regulations which prevent the production within a state's borders of impure foods and articles which would spread

disease and pestilence, the Court in *Sligh v. Kirkwood*, 237 U. S. 52 (1915) held that such categories of materials are not the legitimate subject of trade or commerce, nor within the protection of the commerce clause of the Constitution. Garbage and commercial Wastes as well are not any different.

It is clear that local areas such as Burlington County need protection from environmentally unsound dumping. If the statute at issue is not upheld, in a matter of years New Jersey's sanitary landfills will be full and New Jersey residents will have insurmountable problems pertaining to the disposal of waste. By the proper regulating of landfills, which includes the banning of out-of-state dumping, New Jersey is protecting its residents against the heavy burden of out-of-state waste which is fast becoming a permanent part of the landscape. New Jersey is further protecting the public's health by preventing the exhaustion of present landfills at a faster rate than replacements can be found.

III. Solid Waste in Its Form for Disposal Is Not an Item of Interstate Commerce and Is Subject to State Regulation and Prohibition When It Is for the Protection of a State's Citizens by Preserving the Areas Available for Sanitary Landfill as a Natural Resource.

The disposal of solid wastes in landfills creates a multitude of environmental problems. Sanitary landfills can no longer be considered just holes in the ground. Science and experience has taught us about the great chemical reactions which occur from waste decomposition, creating dangerous methane gas and a highly polluted liquid known as leachate, which lasts as long as twenty years. As a result, only certain areas are available for safe and efficient sanitary landfills. Burlington County has a number of these

landfills which are filling rapidly. There is only so much available land which can be used as an environmentally sound landfill. When it is gone, new areas cannot be manufactured. So, in many respects, this land is as valuable a resource as any of the other natural resources which are particular to a certain area. Figures as old as 1971 show that at least 1½ million tons of solid wastes generated outside New Jersey were brought into New Jersey for disposal annually. New Jersey, being the most densely populated state in America, cannot afford to be the dumping ground for the Northeast. In particular, the Amicus, as the largest county in size in New Jersey, cannot accommodate the City of Philadelphia and other out-of-state sources to the severe detriment of its citizens through the depletion of its valuable sanitary landfill areas. It must be recognized that waste for disposal cannot be considered in the same light, in the commerce sense, as milk, *Hood & Sons, Inc. v. DuMont*, 336 U. S. 525 (1949), or natural gas, or even railroads and highways, *Pennsylvania v. West Virginia*, 262 U. S. 553 (1923), *Brotherhood of Loc. F & E v. Chicago, R. I. & PRR Co.*, 353 U. S. 129 (1968), and *Bibb v. Navajo Freight Lines*, 359 U. S. 520 (1959), all items of legitimate interstate commerce clearly out of the states' jurisdiction to regulate.

It is important to recognize that the New Jersey Statute at issue, N. J. S. A. 13:1I-1 *et seq.* and the subsequent regulations developed by the Commissioner of the New Jersey Department of Environmental Protection, clearly permit the transportation into New Jersey of waste which is to be put to productive use or recycling.

New Jersey's prohibition is only against waste that is to be dumped or burned in incinerators for final disposal. The intent of New Jersey law is to protect the health of its residents and the environment in which they live. The statutory attempt is clearly within the power of the State.

"Today it cannot possibly be questioned that the preservation of the environment and the protection of ecological values are, without more, sufficient to warrant an exercise of this power." *Huron Portland Cement Co. v. Detroit*, 362 U. S. 442 (1960). The New Jersey Supreme Court in its recent opinion on this issue has found that New Jersey is faced with a crisis which is threefold. First, the health of its residents; Second, a severe shortage of land available for sanitary landfills; and Third, the importation of out-of-state waste severely aggravates any attempt to protect the residents and the environment of New Jersey. The police powers allow a state to prevent the importation into that state material which is a threat to public health and safety. *Clasen v. State of Indiana*, 306 U. S. 439 (1939). This case prevented the importation of animal carcasses not slaughtered for food. New Jersey law, in effect, prohibits the importation of solid waste not used in some form of production or recycling. Concerning a state act forbidding unfit produce, the Court in *Pike v. Bruce Church*, 397 U. S. 137, 143-144 (1970) stated:

> To the extent the Act forbids the shipment of contaminated or unfit produce, it clearly rests on sure footing. For, as the Court has said, such produce is 'not the legitimate subject of trade or commerce, nor within the protection of the commerce clause of the Constitution'.

Solid wastes should not be considered differently.

The Amicus as a developing county must be assured that its existing landfills are protected and that new less environmentally sound landfills are not established, in the interest of public safety. Even today, local municipalities are having to travel greater distances at great cost to dispose of local waste. Allowing out-of-state volume dumpers

to use Burlington County will greatly affect the immediate health and safety of Burlington County residents and place even a heavier burden upon the state to find new sources for waste disposal not only for its residents but also for the waste transported into New Jersey from out-of-state, a burden which is without equity.

CONCLUSION.

The State of New Jersey is attempting to protect its citizens from the reckless depletion of available land resources suitable for sanitary landfill. If the statute at issue is struck down, out-of-state dumping in areas of delicate ecological balance such as Burlington County will go unabated, causing local governments to find new and most likely less safe and environmentally sound dumping areas. The results would lead to health and environmental consequences that the New Jersey law and other similar laws across the nation seek to avert. Sanitary landfills today are a necessary though undesirable solution to solid waste disposal. Local areas, such as Burlington County, must be protected from becoming regional dumping zones merely for convenience and economics.

The Federal legislation as Congress clearly intended should be interpreted as an aid to the states, not a pre-emption over the states. It is respectfully submitted that for the aforesaid reasons, the New Jersey Waste Control Act should be upheld.

Respectfully submitted,

M. JEFFERSON DAVIS,
Burlington County Solicitor,
Attorney for Amicus Curiae,
Board of Chosen Freeholders
of the County of Burlington of
the State of New Jersey.

Of Counsel:
MICHAEL J. HOGAN,
Assistant County Solicitor.